1940

State of Utah v. Jesse Andersen : Brief of Appellant

Utah Supreme Court

Edward F. Richards; Attorney for Defendant and Appellant;

6300

IN THE

Supreme Court of the State of Utah.

STATE OF UTAH, *Plaintiff and Respondent,* vs. JESS ANDERSEN, *Defendant and Appellant.*	Case No. 6300.

APPELLANT'S BRIEF.

EDWARD F. RICHARDS,
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APPELLANT'S BRIEF.

STATEMENT OF CASE.

The appellant above named was charged by a complaint in the City Court of Salt Lake City with having committed the crime of involuntary manslaughter and after a preliminary hearing was bound over to the District Court and found guilty by a jury in the District Court. He was thereafter sentenced to twelve months in the County Jail of Salt Lake County.

The manslaughter charge arose by reason of an automobile accident which occurred on the 25th day of February, 1940, in which accident the automobile operated by the appellant collided with an automobile operated by one Clark Romney at the intersection of 21st South and Third East Street. That the said Clark Romney died the same day as a result of said accident.

A bill of particulars submitted in the District Court contended that the defendant and appellant drove his automobile at an excessive rate of speed, to-wit, forty miles an hour, and failed to stop at a stop sign located on the south side of 21st South Street at its intersection with Third East Street.

STATEMENT OF FACTS.

The accident occurred at approximately 7:00 A. M. on the morning of February 25, 1940, and was observed by Alex Ingstrom and Kenneth H. Silcox (Tr. 71, Abst. 11; Tr. 95, Abst. 17). Both of these witnesses testified that they saw both cars approach the intersection of Third East and 21st South and Mr. Ingstrom estimated the speed of the Ford at between forty and forty-five miles per hour (Tr. 72, Abst. 12). Both witnesses mentioned contend that both automobiles entered the intersection at approximately the same time, or that the Oldsmobile might have reached the intersection a little before the Ford, which was driven by the defendant (Tr. 88, Abst. 15; Tr. 96, Abst. 18). These witnesses also stated that the Ford struck the Oldsmobile in the center of the car at approximately the center of the intersection. That the Ford stopped almost instantly after the impact but that the Oldsmobile went five or six feet in the air, turned over twice and came to rest some distance down 21st South on the curbing between the sidewalk and the street (Tr. 73, Abst. 12; Tr. 100, Abst. 19).

Mr. Pierce, the officer investigating the accident, testified as to the tire marks and location of the automobiles when he arrived at the scene of the accident (Tr. 112,

Abst. 21). The skid marks coming in from Third East Street were forty-four feet in length to the place of impact (Tr. 111, Abst. 21) and that there were also skid marks in the shape of an arc of approximately twenty-six feet which indicated that the Ford had been swung around (Tr. 114, Abst. 22). He then testified that by using a certain formula and taking the condition of the highway into consideration, if the Ford car had come to a stop at the point of impact, it would have been traveling when the brakes were applied 30.35 miles per hour (Tr. 120, Abst. 24).

A Mr. Taylor, who claimed to be an expert, testified in his opinion after explaining certain formulas and the use thereof that at the time the Ford applied the brakes, it was travelling at 59.3 miles per hour (Tr. 175-178, Abst. 41-43), and that the Oldsmobile was travelling 37 miles per hour (Tr. 180, Abst. 44).

The defendant in a statement made to Officer Pierce stated that he was going about 35 or 40 miles an hour when he approached 21st South and was almost to the intersection before he noticed the stop sign. That he did not know that the stop sign was there and that he applied his brakes and tried to stop but skidded into the other car (Tr. 130, Abst. 27). The facts also disclosed that the man in the Oldsmobile was thrown from the car and that he and his automobile came to rest approximately seventy-eight feet from the point of collision.

Evidence was also introduced by Foster Kunz, Traffic Safety Engineer of the State Road Commission of Utah, that 21st South Street, near the vicinity of Third East Street, was under the jurisdiction of the Road Commis-

sion and that the stop sign on the south side of 21st South and on the west side of Third East Street was placed there by direction of the State Road Commission (Tr. 210-215, Abst. 56-58).

STATEMENT OF ERRORS RELIED UPON.

1. Failure of the Court to quash the information (Assignment of Error No. 1).

2. Failure of the Court to require plaintiff to furnish further bill of particulars (Assignment of Error No. 2).

3. Failure of the Court to require the state to elect upon which ground of manslaughter it would rely (Assignment of Error No. 3).

4. Failure of the Court to direct a verdict in favor of the defendant (Assignment of Error No. 4).

5. Failure of the Court to grant defendant's motion for new trial (Assignment of Error No. 5).

6. Failure of the Court to grant defendant's motion in arrest of judgment (Assignment of Error No. 6).

7. The Court erred in introduction of evidence and in failing to sustain defendant's objection to numerous questions asked (Assignments of Error Nos. 7, 8, 9, 10 and 11).

8. The Court erred in giving erroneous instructions to the jury (Assignments of Error Nos. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30).

9. The Court erred in refusing to give certain of defendant's requested instructions (Assignments of Error Nos. 31, 32, 33, 34, 35, 36, 37 and 38).

STATEMENT OF PARTICULAR QUESTIONS INVOLVED.

1. The complaint in this matter does not charge a crime nor does it state facts sufficient to advise the defendant the nature and cause of the accusation against him.

2. That the defendant did not have a preliminary hearing and he did not waive the same.

3. That the district attorney had no authority to file the information in this cause.

4. That the information did not advise the defendant of the nature and cause of the accusation against him.

5. That where a crime is charged in the conjunctive a conviction may not be had thereon unless the crime was the result of both acts charged.

6. A hypothetical question must be based on facts actually proven or on observations made by the expert himself, or both.

7. Instructions which go beyond the pleadings and stipulated issues of a case are erroneous.

8. Erroneous giving and refusal to give instructions.

9. Insufficiency of evidence to support the verdict.

ARGUMENT.

I.

The Complaint Does Not Charge a Crime nor Does it State Facts Sufficient to Advise the Defendant of the Nature and Cause of the Accusation Against Him.

The complaint filed by the county attorney and upon which the defendant was supposed to have had a preliminary hearing stated in the charging part thereof as follows:

> "* * * That Jesse Anderson on the 25th day of February, A. D. 1940, at the County of Salt Lake, State of Utah, did commit the crime of involuntary manslaughter as follows, to-wit: Jess Anderson killed Clark Romney without malice, contrary to the provisions of the statute of the state aforesaid in such cases made and provided and against the peace and dignity of the State of Utah."

This does not state sufficient facts to charge the defendant with involuntary manslaughter, or any other crime in accordance with the rule and holding of this court in the case of *State* v. *Gesas,* 49 Utah, 181, 162 Pac. 366, which case holds:

> "The defendant is charged with involuntary manslaughter under a statute which merely states the offense in the most general terms. Under that statute a person may be guilty of a large variety of things which may ultimately result in the crime of involuntary manslaughter. The information in this case, we think, comes within subdivision 3 of section 4732, *supra,* which requires that 'the particular circumstances of the offense' must be stated 'when they are necessary to constitute a complete offense'. As

> the information now stands, the defendant is not charged with having committed or omitted any particular thing which caused the death of the deceased. Nothing in that regard is alleged save the conclusions of the pleader. The pleader certainly must have had in mind some act or some omission on the part of the defendant which caused, or directly contributed to, the death of the deceased. What is that act or omission? What is the defendant required to meet? What act or omission is he to explain or controvert? We confess that we are entirely unable to discover any particular act or omission that the defendant is called on to defend against. * * *"

Nor does the complaint charge a crime under what is termed our short form law, for under Section 103-28-5, Revised Statutes of Utah, 1933, manslaughter, whether voluntary or involuntary, is the unlawful killing of a human being without malice, and the short form information or complaint suggested in Chapter 118, Laws of Utah, 1935, is as follows:

"A.B. unlawfully killed C.D."

while in this case the word "unlawfully" has been entirely omitted from the complaint.

Can we say that by the conclusion of the pleader in using the words "involuntary manslaughter", he has supplied the necessary requirements required under Section 12, Article 1 of the Constitution of the State of Utah, and Section 105-1-8, Sub. 2, Revised Statutes of Utah 1933, or even the short form statute? Had the pleader merely said that the defendant had committed the crime of involuntary manslaughter, there might be some merit to this contention.

However, even though our laws of 1935 provide that a crime may be charged by the use of a common law or statutory name, we feel that where the crime may be committed in two or more different ways, such as involuntary manslaughter, the pleader is not then justified under our constitutional provision and under Section 105-1-8, Sub. 2, to merely set forth the name of the crime. In this case, however, the pleader did not stop with the words "involuntary manslaughter" but continued by specific allegations to tell us how the death occurred and by such words it is clearly shown that this defendant committed no crime. Therefore, either the conclusion of the pleader was erroneous and not based upon pleaded facts, or the general allegation that he committed the crime of involuntary manslaughter is in conflict with the specific allegations alleged in the complaint, and where specific allegations are in conflict with general allegations, the specific allegations will control.

Thomas v. *Ogden State Bank, et al.*, 80 Utah 138, 13 Pac. (2d) 636:

> "* * * It is a familiar rule in pleading that general allegations are controlled by special allegations inconsistent therewith. *State* v. *Rolio*, 71 Utah 91, 262 Pac. 987, 49 C. J. 119."

State v. *Rolio*, 71 Utah 91, 262 Pac. 987:

> "* * * If a plaintiff, after alleging title in general terms, attempts to set out the facts or source of his title by specific averments, ordinarily the latter may be regarded as controlling the former, especially if the latter are inconsistent with the former."

II.

The District Attorney Had No Authority to Issue an Information and the Court Had No Jurisdiction in the Matter.

We assume that there is no question that if the complaint upon which the defendant had his alleged preliminary hearing did not state a crime, there was no preliminary hearing. In the case of *State* v. *Sheffield,* 45 Utah 426, 146 Pac. 306, the Court stated:

> "Under the Constitution and the statutes of this state, a preliminary examination, unless waived by the accused with the consent of the state, is a prerequisite to a prosecution by information. *A verified complaint or an affidavit before a magistrate charging the accused with a public offense is essential to the examination.* Without it the power of the magistrate to act is not judicially invoked." (Italics ours.)

See also *State* v. *Pay,* 45 Utah 411, 146 Pac. 300; *State* v. *Hale,* 71 Utah 134, 263 Pac. 86.

And it has been well settled in this jurisdiction that before the district attorney can issue an information and the district court take jurisdiction of a case, the defendant must either have a preliminary hearing or have waived the same and also that the offense charged in the information must be the same offense as was charged in the complaint.

State v. *Hale, supra,* states as follows:

> "This court has repeatedly held that an accused, if he objects, may not be tried in the district court upon an information unless he has either had a preliminary examination, or, with the consent of the state, has waived a preliminary examination of the offense charged. *State* v. *Jensen,* 36 Utah, 166, 96 P.

1085; *State* v. *Hoben,* 36 Utah, 186, 102 P. 1000; *State* v. *Pay,* 45 Utah, 411, 146 P. 300, Ann. Cas. 1917E, 173; *State* v. *Sheffield,* 45 Utah 462, 146 P. 306; *State* v. *Nelson,* 52 Utah, 617, 176 P. 860. If in the instant case a preliminary examination had been held and evidence offered tending to show that the defendant treated one of the seven persons concerning which evidence was offered at the trial, could the state, in such case, properly try, over objection, the defendant for treating any one of such other six persons? Clearly such procedure is condemned by the cases last above cited."

In *State* v. *Hoben,* 36 Utah 6, 102 Pac. 1000, the Court stated:

> "* * * It was with respect to the offense of April, 1906, and to the transactions out of which it arose, that defendant was given his constitutional privilege of a preliminary hearing. The district attorney, in the information, charged him with the offense growing out of that transaction. *He could not legally charge him with any other.*"

In this case, where the complaint before the magistrate entirely failed to state a crime, then of course if the district attorney charged a crime in his information, he would have to charge a different crime than that upon which the defendant had a preliminary hearing.

III.

The Information Did Not Advise the Defendant of the Nature and Cause of the Accusation Against Him.

The information which is set forth in full at pages 2 and 3 of the abstract, like the complaint, does not advise the defendant of the nature and cause of the accusation against him as required by our constitution and the laws

of this state unless again we can say that the mere use of the words "involuntary manslaughter" describes the crime, for after such a conclusion the district attorney has alleged:

> "That on the 25th day of February, A. D. 1940, in Salt Lake County, State of Utah, the defendant Jesse Anderson did unlawfully and without malice kill Clark Romney."

Let us assume for argument that such a statement is sufficient to charge under our statute the crime of manslaughter for these words are the exact definition of manslaughter set forth in Section 103-28-5, Revised Statutes of Utah, 1933. The information still does not advise the defendant except for the conclusion above mentioned whether he is charged with voluntary or involuntary manslaughter and under this point we respectfully submit that the argument and authorities in relation to the fact that general allegations are controlled by special or specific allegations is the same as set forth under our argument concerning the complaint before the magistrate. As this court has held in numerous cases and particularly in the case of *State* v. *Jessup*, ... Utah ....., 100 Pac. (2d) 969, that a bill of particulars cannot cure a defect in either a complaint or an information, we respectfully submit that the defendant in this case should have been advised in the information sufficient facts to determine whether he was being charged with voluntary or involuntary manslaughter, whether the same was committed while he was in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection, and that the bill of particulars at the most could only furnish details concerning one of these charges.

IV.

A Crime Charged in the Conjunctive Must be Proved in the Conjunctive.

In this case in the bill of particulars submitted to the defendant under the paragraph marked "Means" and which is set forth on pages 5 and 6 of the Abstract, the district attorney stated that the defendant was driving said automobile at a speed in excess of forty miles an hour, which speed was dangerous and excessive and that said Jesse Anderson did not stop at a stop sign facing south on Third East Street and that as a result of said acts the death of Clark Romney was caused.

The issues in this case were also limited by the stipulation of the Assistant District Attorney Mr. Roberts when he stated to the court as follows:

> "In that case, Your Honor, the State will not prove any acts except as stated; that is, excessive speed and going through a stop sign." (Trans. 28, Abst. 7.)

In the case of *State of Utah* v. *Vance,* 38 Utah 1, 110 Pac. 434, the defendant there was charged with having committed murder by poisoning and beating and this court held as follows:

> "* * * There is one, and only one, ground upon which the court's ruling in denying appellant's second motion can be sustained, which is that the pleader in the third count stated but a single means as causing the death of the deceased, namely, the co-operation of two distinct causes which produced the mortal sickness from which it is alleged the deceased languished and finally died. The pleader had a right to accuse appellant of having used one, two, or more means, or

of causing death by applying two distinct means as co-operating causes, the joint effect of which produced death. As we have seen, the pleader could have availed himself of charging all these means by pleading in a certain way. He did not choose to do so, but specifically alleged that the appellant committed an assault upon the deceased and used certain means on one day, and that he committed another assault and applied certain other means on another day, and that the effect of the means so described co-operating together produced a mortal sickness which caused death. The effect of the allegations in the third count is that the two causes, one arising from the beating and bruising and the other from the administering of the poison, co-operating together, produced death. This being so, the court was right in not requiring the state to elect, since in legal effect there was but one cause of death alleged, namely, the joint effect of the beating and bruising co-operating with the effect produced by the poisoning. It is also clearly shown by the record that the trial proceeded upon this theory. The physicians testified that death did not result from either the beating alone, or from the effects of the poison alone, but that it was caused by the co-operating influence of the effects of both, and this thus constituted but a single, and the real, cause of death. This, in legal effect, is just what was charged as the means of death in the third count. But, notwithstanding this, the court ruled and instructed the jury that they could find the appellant guilty if they believed from the evidence beyond a reasonable doubt that the deceased died from the effects of the beating and bruising and kicking alone, or from the effects of the poison alone, or from the combined effects of both. As we have seen, this charge might have been proper if the information had been different, but, in view of the language contained in the third count of the information, there was no distinct charge left upon which to base a finding that death was caused except from the co-operating causes, which in and of itself

excluded the charge that either one of those causes produced, or could have produced, death. The court therefore erred in charging the jury as aforesaid."

The court, however, in this case disregarded the fact that the pleadings had been plead in the conjunctive and gave instructions Nos. 5, 6 and 6-a, which did not limit the jury to the pleadings. The court also refused to give defendants requested instructions Nos. 1 and 2, both of which instructions required the jury to find that the defendant had driven his automobile in excess of forty miles an hour and had failed to stop at the stop sign. We feel that the giving of the instructions numerated and the refusal to give those just mentioned is contrary to the decision above quoted and is error upon which a new trial must be granted.

V.

A Hypothetical Question Must be Based on Facts Actually Proven or on Objections Made by the Expert Himself or Both.

It is the contention of the appellant that the Court erred in overruling the objection to the hypothetical question asked of Mr. Taylor which appears as Assignment No. 9 and is set forth in Abstract 38 and 39, Transcript 169 and 171, and also appears at pages 83 and 84 of the abstract. The objection made to this long hypothetical question besides it being incompetent, irrelevant and immaterial, was that certain elements in the evidence had not been taken into consideration and that the witness had taken certain matters into consideration which had not been introduced in evidence and of which the witness did not have personal knowledge.

It is apparent from a cross examination of Mr. Taylor that he took into consideration in answering his question certain information given to him by Mr. Pierce and also that he had read statements made by witnesses to the police officer. These statements were not introduced in evidence. As to the consideration of such statements in expressing his opinion see Abstract page 43, Transcript 178, where the witness stated:

> "The opinion I have given is taking into consideration certain information Mr. Pierce gave to me at some other time. I read the statement of the witnesses he has in his police report and that is where I got my facts from with the exception of the facts Mr. Rawlings has shown on the board and my own observations."

This court held in the case of *State* v. *Lingeman,* 97 Utah 180, 91 Pac. (2) 457, as follows:

> "* * * Experts may give answer to such questions both on their own observations as a foundation or on evidence adduced from other sources which may for the purposes of the question be assumed as facts. *Wilson* v. *Guaranteed Securities Co.,* 82 Utah 224, 234, 23 P. (2d) 921; *Atlantic Life Ins. Co.* v. *Vaughan,* 6 Cir., 71 F. (2d) 394, certiorari denied, 293 U. S. 589, 55 S. Ct. 104, 79 L. Ed. 684; *Monark Battery Co.* v. *Industrial Commission,* 354 Ill. 494, 188 N. E. 413; *Ballance* v. *Dunnington,* 241 Mich. 383, 217 N. W. 329, 57 A. L. R. 262; *Hester* v. *Ford,* 221 Ala. 592, 130 So. 203; *Wolczek* v. *Public Service Co.,* 342 Ill. 482, 498, 174 N. E. 577; *Treadwell* v. *Nickel,* 194 Cal. 243, 228 P. 25; Wigmore, op. cit. Sec. 652. But experts cannot give an opinion on matters not observed by them or not in evidence by the testimony of others. We have discussed with perhaps too much particularity the claimed omissions and intrusions of facts claimed not

to be in evidence. We do not consider it necessary to further discuss this question, save to advance the admonition that the court and counsel should be careful to see that a hypothetical question presents or assumes no fact that is not in evidence; that it does present all facts or elements necessary to the determination to be made by the witness, or to enable him properly to form an expert opinion; and that no material element or fact is used by the witness in his determinations that is not presented in the question as asked."

Again the witness stated on cross examination that he based his opinion on how the street appeared when he saw it and not how it was at the time of the accident. It is therefore apparent from both of these statements that the witness may have taken into consideration numerous elements and items of which the defendant was not advised and upon which he had no right of cross examination.

VI.

Instructions Which Go Beyond the Evidence and Pleadings Are Erroneous.

As has heretofore been indicated, the pleadings limit the acts which the defendant committed and upon which the state relied in order to prove their charge of involuntary manslaughter to operating an automobile at an excessive rate of speed, to-wit, forty miles an hour, and failing to stop at a stop sign. The court, however, in instructing the jury, disregarded the allegations set forth in the bill of particulars and the limitations placed upon the state by its stipulation made at the time a further bill of particulars was requested, for the court instructed the

jury in its instruction No. 5 that the laws of the state of Utah in force at the time of the accident were as follows:

"Instruction No. 5.

You are instructed that the laws of the State of Utah in force on the 25th day of February, 1940, provide as follows:

First: That it shall be unlawful for any person to drive any vehicle upon any highway carelessly and heedlessly in willful or wanton disregard of the rights and safety of others.

Second: That it shall be unlawful for any person to drive any vehicle upon any highway without due caution and circumspection and at such a speed or in such a manner as to endanger any person or property.

Third: That it shall be unlawful for any person to drive any vehicle upon any highway at a speed greater than is reasonable and prudent, having due regard for the traffic, surface and width of the highway and the hazards at intersections, and any other condition then existing.

Fourth: That it shall be unlawful for any person to drive any vehicle upon any highway at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease speed or to stop, as may be necessary, to avoid colliding with any person, vehicle or other conveyance upon or entering the highway in compliance with the legal requirements and with the duty of drivers and other persons using the highway, to exercise due care.

Fifth: That it shall be unlawful for any person to fail to stop in obedience to a stop sign, bearing the words 'Stop' in letters of a size to be clearly legible from a distance of one hundred feet, placed at an intersection, which said stop sign is placed there by the State Road Commission or by the local authority having said intersection under its jurisdiction.

You are further instructed that anyone violating any of the provisions of law as set forth above is guilty of the commission of an unlawful act not amounting to a felony."

By this instruction and numerous others, namely, Instruction No. 6 and particularly paragraph 2 thereof, the court has instructed the jury that if they find that the defendant violated the provisions of the law as set forth in such a manner as to evince marked disregard for the safety of others, he could be found guilty of manslaughter. Also, Instruction 6-a is a general charge and does not limit the jury to the pleadings. These instructions would give the jury the right to speculate on numerous grounds of recklessness not set forth in the bill of particulars nor included under the stipulation entered into. For instance, paragraph 4 of Instruction No. 5 would permit them to find that in case the defendant drove at a speed which is greater than would permit the driver to exercise proper control of the vehicle or to decrease the speed or stop as may be necessary to avoid colliding with any person or vehicle would be sufficient, whereas, the bill of particulars and the stipulation entered into limited to the pleadings that the speed must be in excess of forty miles an hour. Likewise, the general statement made in paragraph 2 of Instruction No. 5 would leave to the jury to determine whether the defendant drove his car without due caution and circumspection, regardless of whether he violated any speed law or failed to stop at the stop sign. The same criticism can be made of each and every paragraph in Instruction No. 5 and to each instruction contending that a violation of the law set forth in Instruction No. 5 could be considered as recklessness, nor is there any evidence to

support such instructions regardless of the pleadings as the only evidence introduced went merely to prove either the failure to stop at the stop sign or the speed at which the car was travelling.

This court has held in the case of *Industrial Commission of Utah* v. *Wasatch Grading Company,* 80 Utah 223, 14 Pac. (2d) 988, as follows:

> "* * * It is a well-established rule of law in this, as well as other jurisdictions, that the acts of negligence relied upon by the plaintiff for a recovery must be both alleged and proved. It is reversible error to instruct the jury that they may find a verdict for a plaintiff because of some negligence which is not pleaded or which is without support in the evidence. *Smith* v. *San Pedro, L. A. & S. L. R. Co.,* 35 Utah 390, 100 P. 673; *Macky* v. *Bingham New Haven Copper & Gold M. Co.,* 54 Utah 171, 180 P. 416; *Martindale* v. *Oregon Short L. R. Co.,* 48 Utah 464, 160 Pac. 275; *Kendall* v. *Fordham,* (Utah) 9 P. (2d) 183."

VII.

The Court Permitted Error in Giving Instructions and in Its Refusal to Give Defendant's Requested Instructions.

As we have heretofore indicated, the court in giving Instructions 5, 6 and 6-a, has permitted the jury to speculate on grounds of recklessness other than those charged in the information or furnished by the bill of particulars. The court also erred in refusing to give defendant's requested instruction No. 7 which sets forth the speed laws governing the territory in question. It was error for the court to refuse to give such instruction after it was stipulated between counsel that the south line of 21st South Street is the end of Salt Lake City limits and that the land

lying south of that line is in Salt Lake County (Tr. 206, Abst. 64), for with this stipulation and with no evidence having been introduced by the state that any different speed limit was posted for Third East Street south of 21st South, the defendant certainly was entitled to operate his automobile at the rate of 50 miles per hour when the evidence clearly shows that it was early in the morning and that there was no other traffic upon the highway, and the jury should have been instructed in this regard as requested.

We have already mentioned the error committed by the Court in refusing to give defendant's requested Instructions Nos. 1 and 2.

Defendant also respectfully submits that his requested Instructions Nos. 9, 10 and 12 properly set forth the law in regards to what acts must be done by defendant before he may be found guilty of involuntary manslaughter. We contend that even though the court has in his Instructions Nos. 8, 8-a and 9 attempted to cover this feature, the court has not gone to the extent it should have and to the extent that the defendant requested in his instructions.

VIII.

Insufficiency of Evidence to Support the Verdict.

It is the contention of the defendant that the evidence will not support the verdict for involuntary manslaughter. In this regard we must keep in mind that mere negligence or carelessness is insufficient and as stated in the case of *State* v. *Lingeman, supra,* it is necessary to show criminal negligence, that is, reckless conduct or conduct evincing a marked disregard for the safety of others. The only

facts that we have in this case are that the defendant did go through a stop sign, he stating however (Tr. 130, Abst. 27), "I was driving about 35 or 40 miles per hour as I approached 21st South. I was almost to the intersection when I noticed the stop sign. I did not know there was a stop sign until I saw it. I applied my brakes and tried to stop but I skidded into the other car."

Certainly one cannot say that because a person fails to see a stop sign that this is evidence of marked disregard for the safety of others, particularly when the accident happened early in the morning and there was no other traffic upon the highway and the defendant was entitled so far as the evidence shows to have been driving his car at a rate of approximately fifty miles an hour. The only other ground of recklessness or negligence upon which the defendant can be convicted is that of speed. It is true that the expert, Mr. Taylor, testified that he was travelling 59.3 miles per hour when the brakes were applied (Tr. 178, Abst. 43). As we have already pointed out, the testimony of Mr. Taylor in our opinion is speculative and based on facts not within the record and was improperly admitted. Contrary to the evidence of Mr. Taylor we have the statement of the defendant heretofore mentioned, the testimony of Mr. Kenneth H. Silcox (Tr. 96, Abst. 18) that the defendant was going about forty miles an hour, and the testimony of Alex Engstrom that the defendant was travelling between forty and forty-five miles an hour (Tr. 72, Abst. 12).

Can we say therefore that merely because a man is travelling at, say 45 miles an hour, when there is no other traffic upon the highway, he is showing marked disregard for the rights and safety of others and because he fails to

see a stop sign that he is guilty of criminal negligence and should be deprived of his freedom?

The question would be different if the highways had been crowded or if the defendant had seen the stop sign and because he was in a hurry had wilfully gone through the same.

We therefore respectfully submit that a verdict should have been directed in favor of the defendant in this case; that the errors assigned by the defendant are reversible errors and that the Court should have granted a motion for new trial or a motion in arrest of judgment, and that this Court should now set aside the judgment and verdict rendered in this cause.

Respectfully submitted,

EDWARD F. RICHARDS,
Attorney for Defendant.

SEE TYPEWRITTEN BRIEFS
FOR NO. 6300